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No. 05-433

IN THE

Supreme Court of the United States

DREAMSCAPE DESIGN, INC., a corporation,

Petitioner,

v.

AFFINITY NETWORK, INC., a corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The United States Court of Appeals for the Seventh Circuit affirmed the district court's decision that federal telecommunications law impliedly preempts the state law claims of plaintiff Dreamscape Design, Inc. The Seventh Circuit held that even after detariffing in 2001, the "filed tariff doctrine" (sometimes referred to as the "filed rate doctrine"), developed by courts to ensure compliance with the Federal Communications Act of 1934, continues to preempt state law challenges to long-distance telephone service rates. In so holding, the Seventh Circuit expressly acknowledged that its decision was contrary to a 2003 decision of the United States Court of Appeals for the Ninth Circuit, which held that federal preemption could not, and did not, survive detariffing. The question thus presented is: Does the FCA continue, even after detariffing, to preempt state law challenges to a long-distance carrier's violations of its contractual and pre-contractual commitments?

CORPORATE DISCLOSURE STATEMENT

Dreamscape Design, Inc ("Dreamscape"), is a corporation organized and existing under the laws of Illinois, with its principal office located at One Henson Place in Champaign County, Illinois. Dreamscape is a creator and provider of website design and technology, animation and multimedia presentations, and promotional videos. Dreamscape has no parent company and is not publically traded.

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The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 414 F.3d 665 (7th Cir. 2005). *See* App. A. The Seventh Circuit affirmed the July 12, 2004, decision of the United States District Court for the Central District of Illinois. *See* App. B.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Seventh Circuit's opinion was rendered on July 5, 2005, and its mandate was issued on July 27, 2005. (App. A.) This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Pursuant to the Supremacy Clause, U.S. Const. Art. VI, cl. 2, federal law can preempt and displace state law. The "filed tariff doctrine" derives from the Federal Communications Act of 1934 (the "FCA"), as amended, 47 U.S.C. § 203. Under the Telecommunications Act of 1996, 47 U.S.C. § 160(a) ("the 1996 Act"), the Federal Communications Commission ("FCC") was empowered to exempt carriers from filing tariffs. Pursuant to the 1996 Act, the FCC issued a series of orders mandating detariffing.

Section 201(b) of the FCA provides:

> All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice,

classification or regulation that is unjust or unreasonable is declared to be unlawful.

Section 202(a) of the FCA provides:

> It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

Section 203(a) of the FCA provides in relevant part:

> Every common carrier . . . shall . . . file with the Commission and print and keep open for public inspection schedules showing all charges . . . and showing the classifications, practices, and regulations affecting such charges. Such schedules shall . . . be posted and kept open for public inspection . . . each such schedule shall give notice of its effective date. . . .

Section 203(c) of the FCA provides in relevant part:

> [N]o carrier shall . . . charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named

> in any such [tariff] schedule than the charges specified in the schedule then in effect.

Section 160(a) of the 1996 Act directed the FCC to:

> forbear from applying any regulation or any provision of this chapter if the Commission determines that –
>
> > (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
> >
> > (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
> >
> > (3) forbearance from applying such provision or regulation is consistent with the public interest.

On March 25, 1996, the FCC issued a Notice of Proposed Rulemaking to "forbear from applying" the tariffing requirements of § 203 of the FCA. *Notice of Proposed Rulemaking*, 11 F.C.C.R. 7,141 (1996). Following a comment period, the FCC issued an order of mandatory detariffing on October 29, 1996. *See Second Report and Order*, 11 F.C.C.R. 20,730 (1996). As the Seventh Circuit noted (*see* App. A at 8a), "the tariff requirement was canceled altogether" as of July 31, 2001.

STATEMENT OF THE CASE

This petition seeks review of a decision of the United States Court of Appeals for the Seventh Circuit, upholding a decision of the United States District Court for the Central District of Illinois, with respect to federal preemption under the FCA's filed tariff doctrine. The Seventh Circuit's decision is expressly contrary to that of the United States Court of Appeals for the Ninth Circuit in *Ting v. AT&T*, 319 F.3d 1126 (9th Cir. 2003).

Dreamscape's amended complaint was filed on April 23, 2004, asserting *inter alia* that Affinity violated the Illinois Consumer Fraud and Deceptive Practices Act ("ICFA"), 815 ILCS § 505 *et seq.*, and the common law of contracts, by misstating its rates for long-distance telephone service in its pre-contractual representations. Dreamscape claimed that Affinity advertised long-distance rates of five cents per minute for in-state service, and 8.9 cents per minute for calls from Illinois to elsewhere in the continental United States. However, when Affinity invoiced Dreamscape for its services, it billed by "total call unit" (or "TCU"), instead of by the minute, resulting in substantially higher long-distance telephone rates than stated by Affinity in its representations. All of Affinity's relevant conduct and services took place after 1996 (following Congress's passage of the 1996 Act, which ended the mandatory filing requirements of the FCA). Dreamscape's amended complaint further stated a claim based on breach of contract by Affinity after July 31, 2001 (when the FCA's tariff requirement had been canceled altogether). Dreamscape's amended complaint sought, *inter alia*, monetary damages in the amount suffered.